Mackenzie Valley Land and Water Board
7th Floor - 4922 48th Street
P.O. Box 2130
YELLOWKNIFE NT X1A 2P6
Phone (867) 669-0506
FAX (867) 873-6610

Reasons for Decision

Issued pursuant to the
Mackenzie Valley Resource Management Act (MVRMA)

Type A Land Use Permit and Type B Water Licence Applicability of Section 157.1 of the MVRMA	
Preliminary Screener	MVLWB
Reference/File Number	MV2017P0013 and MV2017L1-0002
Applicant	Enbridge Pipelines (NW) Inc.
Project	Line 21 Segment Replacement Project, Fort Simpson, NT

Decision from Mackenzie Valley Land and Water Board
Meeting of

August 3, 2017

With respect to these Applications, notice was given in accordance with sections 63 and 64 of the MVRMA and section 43 of the *Waters Act*.

Introduction

Enbridge Pipelines (NW) Inc. (Enbridge or Applicant) submitted Applications for a Permit (MV2017P0013) and a Licence (MV2017L1-0002) on March 23, 2017 to conduct off right-of-way (RoW) activities for the maintenance of the Norman Wells (Line 21) pipeline from Norman Wells, NT to the Alberta/NT border near Fort Simpson, NT (the Project).

The existing Line 21 pipeline runs a total length of 869 km between Norman Wells, NT and Zama, Alberta. In 2016, through regular maintenance and inspection, increased rates of slope movement were identified near the Mackenzie River crossing, approximately 9 km east of Fort Simpson, NT. In order to protect the pipeline from the impacts of further slope movement, and to support continued safe operation of the pipeline, Enbridge is proposing to replace a segment of the existing pipeline under the Mackenzie River. The Project includes installation of up to 2500 m of new pipeline below the Mackenzie River, using a Horizontal Directional Drilling (HDD) method. The existing segment of pipe will be decommissioned in place.

The table below lists the components of the Applications which are to be conducted off the RoW:

Application Component	Details
Site Clearing	• Improvements to the shoofly access on the north shore • Clearing of vegetation for camps, staging/laydown storage, barge landing, and wellsite (south work site), where necessary
Mobilization of Equipment	• Set up drill and supporting equipment
The Use of Water	• For drilling fluid make-up water and to support camp operations
HDD	• On South Work Site (proposed exit)
Site Restoration	• Surface grades and drainages will be restored • Excavations will be backfilled • Brushing and peat will be rolled back over disturbed • The north shore shoofly access and the north shore barge landing will be remediated • Erosion and sediment controls will be installed
Demobilization	

The table below lists the components of the Applications which are to be conducted on the RoW:

Application Component	Details
Site Clearing	• An all-weather access road (mat road) on the existing south RoW (includes installing a temporary clear span bridge over Manners Creek and rig matting over other watercourse crossings with the potential use of culverts if required) • Clearing of vegetation from RoW, where necessary
Mobilization of Equipment	• Set up drill and supporting equipment
The Use of Water	• For drilling fluid make-up water and hydrostatic testing
HDD	• On North Work Site (proposed entry)
Decommissioning	• Finalizing the decommissioning of the existing pipe in place
Site Restoration	• Surface grades and drainages will be restored • Excavations will be backfilled • Brushing and peat will be rolled back over disturbed • Erosion and sediment controls will be installed
Demobilization	

Background

Board staff deemed the Applications complete and distributed them for review by interested parties on April 19, 2017. The Board met on May 25, 2017 and determined under section 22(2)(b) of the Mackenzie Valley Land Use Regulations (MVLUR) that further studies were required for the Permit and issued two Information Requests (IR); IR 1 to Enbridge and IR 2 to Liidlii Kue First Nation. IR 1 specifically addressed the question of the Preliminary Screening exemption found in s.157.1 of the MVRMA and sought input from Enbridge on the following:

1. Was the Line 21 Pipeline Project the subject of a Water Licence or Land Use Permit issued before June 22, 1984?

2. Was the Line 21 Pipeline Project subject to a process of environmental impact assessment before June 22, 1984?
3. What is the relationship between the work proposed for the Line 21 Segment Replacement Project and the original Line 21 Project or undertaking?
4. Were maintenance and operational activities considered as part of the environmental impact assessment of the original Line 21 Pipeline Project?
5. Please list and set out the scope of all regulatory approvals required for the Line 21 Replacement Project.
6. With specific reference to the Applications please provide a detailed explanation of whether the Line 21 Replacement Project represents a significant alteration to the Line 21 Pipeline Project.
7. With specific reference to the Applications please indicate whether the Line 21 Replacement Project represents an abandonment or decommissioning of the Line 21 Project. Explain why.
8. Please provide your argument to the Board about the application of section 157.1 of the MVRMA to the Line 21 Replacement Project.
9. Please provide any recommendations for additional Water Licence or Land Use Permit conditions that could help avoid or mitigate any potential environmental impacts of the Line 21 Replacement Project.

Enbridge responses to IR 1 were received on June 7, 2017 and sent out for review and comment. Reviewer comments were due on June 15, 2017. Comments were received from Dehcho First Nations (DFN) from Carrie Breneman, Liidlii Kue First Nation (LKFN), Sambaa Ke First Nation (SKFN), and the Government of Northwest Territories – Department of Lands (GNWT-Lands).

The following highlights the comments made after parties reviewed Enbridge's responses to IR 1:[1]

DFN (Carrie Breneman)

1. The DFN submitted comments and recommendations related to the initial Applications and did not comment on Enbridge's responses to IR 1, specific to s.157.1.

LKFN:

1. '…a segment of new pipe will be installed using a trenchless crossing method called horizontal directional drilling (HDD)…'; and
2. '…Enbridge will decommission a segment of the pipeline under the Dehcho (Mackenzie River)'.

SKFN:

1. '…significant changes in climatic conditions with thawing permafrost and increased terrain sensitivity.';
2. '…legal contexts have changed since the early 1980s and that earlier reviews would not have adequately considered Aboriginal and Treaty Rights.'; and
3. '…the technologies proposed are new and could not possibly have been considered within the scope of previous environmental assessments, authorizations nor preliminary screenings.'

[1] The full text of these comments can be found on the public registry as document 'MV2017P0013 MV2017L1-0002 - Enbridge - Review Comment Table with Attached Comments - Aug 3_17'

GNWT-Lands

1. Following the review of IR 1, the GNWT-Lands had no further comments or recommendations to offer the Board.

Comments were received on June 20, 2017, after the Board's deadline for submissions, from DFN (Dahti Tsetso) and from the Department of Fisheries and Oceans Canada (a "no comment" letter). The response to reviewer comments from Enbridge, dated June 21, 2017, consequently did not refer to either of these submissions.

On July 20, 2017, the Board decided to accept and consider the late comments submitted by DFN (Dahti Tsetso) and directed Board staff to provide Enbridge an opportunity to respond to those June 20, 2017 comments. A summary of the late comments is provided below.

DFN (Dahti Tseto)

1. "The Project is both a decommissioning of and a significant alteration of the original Enbridge Line 21 Project" which has "the potential to pose significant risks to our environment, water, and Aboriginal and Treaty Rights that should be the subject of a thorough environmental assessment.";
2. "The Project is a cause of public concern" as the HDD is nine kilometres from Fort Simpson;
3. Inadequate information has been presented, "On the impacts of climate change and permafrost degradation", and on the mitigation measures related to the HDD and socio-economic impacts of the associated work camp being located in close proximity to Fort Simpson; and
4. DFN noted their support of the LKFN and SKFN's positions and concerns.

Enbridge responded on July 21, 2017 noting, "There was nothing new in DFN's June 20, 2017 submission that Enbridge had not already responded to regarding the Board's request for comments on the applicability of section 157.1." The DFN June 20, 2017 submission included an 'Appendix A' which Enbridge stated "….is not related to the Board's request for comments regarding the applicability of section 157.1."

Preliminary Screening Exemption

The initial matter which must be addressed by the Board is whether s.157.1 of the MVRMA, a preliminary screening exemption, applies to the Line 21 Replacement Project as described in the Applications. The text of s.157.1 of the MVRMA states that:

> "Part 5 does not apply in respect of any licence, permit or other authorization related to an undertaking that is the subject of a licence or permit issued before June 22, 1984, except a licence, permit or other authorization for an abandonment, decommissioning or other significant alteration of the project."

This is a "grandfathering" provision which has been the subject of several decisions by the Courts.[2] The effect of s.157.1 is to prevent the application of Part 5 of the MVRMA.

The reviewers and Enbridge took different positions on how this section should be interpreted and applied in the context of the Applications. Their arguments are summarized below.[3]

[2] *North American Tungsten Corp. v. Mackenzie Valley Land and Water Board*, 2003 NWTCA 5 ("*Tungsten*"); and *Canadian Zinc Corp. v. Mackenzie Valley Land and Water Board,* 2005 NWTSC 48 ("*Canadian Zinc*").

[3] The Department of Fisheries and Oceans also replied but indicated "no concerns". Consequently, there is no summary of their input.

The Arguments from the Reviewers:

Government of the NWT:

The GNWT provided no argument or analysis of the application of s.157.1 in the Enbridge matter. GNWT simply indicated that s.157.1 of the MVRMA might apply and that the Board would need to make that determination.

Liidlii Kue First Nation:

LKFN characterized the Project as "major changes to a 2.5 km segment of the Line 21 Pipeline".[4] LKFN noted that the environmental assessment of the pipeline (an Environmental Assessment Review Process ("EARP") conducted by a panel) took place in 1980 and that the factors considered and "environment in the area of construction" are markedly different today. LKFN cited changes in the permafrost and "other potential changes in the physical environment" saying they have fundamentally changed the risks and impacts of pipeline construction and operation.

LKFN offered little evidence of these changes in "risks and impacts". LKFN cited one document entitled "Trends in permafrost conditions and ecology in northern Canada"[5] saying that permafrost near the pipeline area has been warming by 0.3 degrees C per decade since the mid 1980s. However, review of the document indicates that this rate of warming is for the Norman Wells area and that the trend in the Fort Simpson area indicates little change.

LKFN also argued that the use of directional drilling could not have been considered in 1980 because that construction technique did not exist then. The LKFN argument says that they "believe" that the impacts of Line 21 on Aboriginal and Treaty rights could also not have been considered in 1980. LKFN then argued that the Project is both a decommissioning and a significant alteration to the original Line 21 project.

LKFN concluded that s.157.1 of the MVRMA does not apply to the Project and that a preliminary screening is required. LKFN then provided some detailed argument based on the wording of s.157.1.

LKFN points out that Enbridge has clearly said that it will decommission the 2.5 km of pipeline that it must replace. They argue that s.157.1 does not explicitly say that all 869 km of the pipeline (the whole of the "undertaking" assessed in 1980) must be decommissioned for the exception to the section to apply to the 2.5 km section of the line which is the subject of the Enbridge applications. LKFN also stated the grandfathering ends "where an existing project is substantively changed from what was initially approved".[6] LKFN found there is nothing in the Enbridge IR response to show that the kind of decommissioning included in the Project was considered by the EARP panel in its 1980 review. LKFN goes on to argue that the Project is a significant alteration of the Line 21 pipeline project. They argue this is because the Project will use new technologies in a "changed geophysical environment".
This argument looks at the Court of Appeal decision and s.74(4) of the *Canadian Environmental Assessment Act*[7] (CEAA) and points out that s.74(4) resulted in application of that Act when "a modification,

[4] Page 1 June 14, 2017 letter ("LKFN letter").
[5] *Canadian Biodiversity: Ecosystem Status and Trends 2010*, Technical Thematic Report No. 9, by S. Smith: Published by Canadian Councils of Resource Ministers, 2011. Figure 2 on page 7 is cited by LKFN. It is found in the section on "Trends in Permafrost Conditions in Each Ecozone".
[6] Page 3 paragraph 2, LKFN letter. Note, this is not the wording used in s.157.1.
[7] CEAA is now repealed but the Court of Appeal held that s.74(4) was the source or origin for the wording in s.157.1 MVRMA.

decommissioning, abandonment or other alteration to the project in whole or in part" took place. (Board's emphasis)[8]

It is important to note that the s.74(4) language is different than s.157.1 which speaks of "an abandonment, decommissioning or other significant alteration of the project" (Board's emphasis). The word "significant" is found in the MVRMA while the words "in whole or in part", found in CEAA, are not.

LKFN argues that what constitutes a "significant alteration" must be understood in the full context of the project and the environment in which it unfolds. They point out that it is 37 years since the EARP review took place and that changes in the permafrost of the area have been "profound". They also say that using directional drilling is "foundationally different"[9] from the methods used in the 1980s when the pipeline crossing was originally built. LKFN argues that taken together the new method of construction and changed environment "constitute a significant departure from the mode of operation approved in 1980".[10] Thus LKFN concludes that there is a significant alteration and that s.157.1 does not apply to the Project.

LKFN finishes by arguing that the Enbridge IR response was not complete and that it does not provide a sufficient record to consider the adequacy of the 1980 EARP process.[11]

Sambaa K'e First Nation:

SKFN supports the legal argument filed by LKFN. SKFN refers to the EARP review and list of permits and licences issued to Enbridge for the original Line 21 project saying that "no detail about the scope of authorizations, review or preliminary screenings is provided"[12] in the Enbridge response to the Board's IR. SKFN indicates that it would like to see all this information and that any consideration of whether the Project is a significant alteration of Line 21 would benefit from a full review of this material.

SKFN repeats and supports the LKFN argument about the Project constituting a significant alteration of the Line 21 project because of changes in the environment, climate, permafrost and in the Mackenzie River itself. Likewise, SKFN points to changes to the legal context since the early 1980s saying earlier reviews would not have adequately considered Aboriginal and Treaty rights. In addition, SKFN is concerned about new technologies that could not have been considered in the 1980s. Thus, they conclude that the Project is a "significant alteration" and that s.157.1 should not apply.

SKFN indicates substantial concerns about the potential social, cultural, and economic impacts of the project on its Members and on SKFN traditional lands. They argue that an EA is required to address these concerns. SKFN singles out the effects of the Work Camp on its Members in Fort Simpson and calls for planning to minimize impacts and the use of local environmental monitors.

The balance of the SKFN argument does not focus on s.157.1 of the MVRMA and the SKFN concludes by requesting an EA of the Project.

[8] The LKFN argument sets out the wording of s.74(4) on page 4 of their letter.
[9] Top of page 5, LKFN letter.
[10] Page 5 paragraph 2, LKFN letter.
[11] Page 6, LKFN letter.
[12] Page 2 paragraph 3 SKFN letter, June 15, 2017.

Enbridge Response:

Enbridge replied to the arguments of LKFN and SKFN on June 21, 2017. Enbridge argued that the Project is exempt from Part 5 of the MVRMA by virtue of s.157.1. They say that the Project is a maintenance project which involves "the replacement of a short segment of Line 21 - 2.5 km of an 869 km long pipeline - at a lowered depth to ensure geotechnical stability, so that the whole pipeline can continue operating exactly as it did earlier."[13] Enbridge says the Project is not an abandonment, decommissioning or other significant alteration to the existing undertaking (Line 21). The Project will only allow Line 21 to return to operations. They say it is an "indivisible" part of Line 21 and is not a decommissioning.

Enbridge argues that the LKFN and SKFN arguments are not supported by the language in s.157.1 of the MVRMA, the policy underlying the section, or the cases which have interpreted it. More specifically they say that the interpretation of s.157.1 offered by LKFN and SKFN is inconsistent with the *Tungsten* case decided by the NWT Court of Appeal.[14]

Enbridge points out that the LKFN and SKFN arguments treat the "undertaking that is the subject of the licence" as something different than the "project" that is to be abandoned, decommissioned or significantly altered. Expressed in other words, Enbridge says the LKFN and SKFN arguments treat the whole undertaking (Line 21) which was the subject of a licence, permit or other authorization before June 22, 1984 as something different than the project described in the current Enbridge applications. Enbridge argues that LKFN and SKFN are only talking about the Project when they argue about the use of the word "project" in s.157.1.

Section 157.1 includes reference to an "undertaking" and to a "project". The Court of Appeal noticed this difference in wording and the NWT Supreme Court commented specifically on it in *Canadian Zinc* as well. In both cases the Courts referred to the French version of s.157.1 to explain this discrepancy. The French version of a federal statute is equally authoritative in law. Enbridge quotes the French version of the section in its argument.

> "157.1 La partie 5 ne s'applique pas en ce qui touche la demande de permis ou d'autorisation dont l'objet est lié à un ouvrage ou une activité [a work or an activity] visé par un permis délivré avant le 22 juin 1984, à moins que cette demande vise la désaffectation, la fermeture ou une modification importante de l'ouvrage ou de l'activité [of the work or of the activity]."[15] (emphasis added).

Note that the French version of s.157.1 uses the same words both times to refer to the project.

In *Tungsten*, Enbridge argues the Court of Appeal made it clear that the undertaking that is the subject of the licence or permit is the same one that is being referred to in the exception. That is, when we ask which project must be subject to abandonment, decommissioning or other significant alteration – it must be the same one that was subject to the pre-1984 licence – in this case, all of Line 21.

Enbridge deals with the balance of the LKFN and SKFN arguments as follows:

> "LKFN and SKFN argue that section 157.1 does not apply because Enbridge is seeking to decommission a small segment of Line 21. That argument is incorrect. What is required to engage

[13] Enbridge Reply, page 2 paragraph 1.
[14] Enbridge Reply, page 3 paragraph 2.
[15] Enbridge Reply, page 3.

> Part 5 is a significant departure from the existing approved infrastructure's approved mode of operation. As the Court of Appeal noted: "…projects which pre-date June 22, 1984 … are to be subjected to full scale environmental assessment as prescribed under the applicable legislation [Part 5] only if they depart significantly from their approved mode of operation and engage in, for example, decommissioning, abandonment or significant alteration of the project" (emphasis added). The proposed decommissioning of a small section of Line 21 (the subject of an application before the National Energy Board) does not in any way represent a departure from the current approved mode of operation of Line 21. Once the replacement segment is installed and the existing segment is decommissioned, Line 21 will continue to operate just as it does today. Replacement of segments of pipe, for reasons of safety and integrity, is unmistakably a maintenance activity.
>
> As an alternative, LKFN argues that replacing 2.5 km of Line 21 would result in a significant alteration of the "mode of operation" of the whole of Line 21 because of altered environmental conditions and evolved construction methods since the Environmental Impact Statement for Line 21 was prepared in 1980. That argument is contrary to the Court of Appeal's ruling in the *Tungsten* case, which holds that to fall within the scope of the exemption under s. 157.1, the undertaking must have had a licence, permit or other authorization issued as of June 22, 1984. Line 21 did. Section 157.1 does not contemplate an assessment of whether environmental conditions or construction methods have changed since the original authorization was issued.
>
> LKFN's argument also fails to recognize that construction practices have evolved to be dramatically less impactful over the past 37 years. For example, HDD is far less intrusive than previous methods which required the diversion of rivers to accommodate open-cut pipeline construction."[16]
>
> "Enbridge has not applied for a licence, permit, or other authorization that would result in the decommissioning of Line 21 or otherwise significantly alter it. Enbridge only seeks to maintain Line 21 *so it can return to normal service. Part 5 is not engaged, by virtue of s. 157.1. Any finding to the* contrary would run counter to the language of that section, Parliament's weighing of competing policy issues, and binding jurisprudence from the Court of Appeal of the Northwest Territories."[17]

Enbridge also responds to the concerns raised by SKFN about the sufficiency of the Enbridge IR response indicating that they answered the questions asked by the Board. They point out that whether the original Line 21 reviews considered Aboriginal and Treaty rights is not relevant to the interpretation of the wording of s.157.1. In concluding, Enbridge points out that the Project will still be subject to environmental scrutiny in the Board's permitting and licensing process and that the NEB review is ongoing and has a hearing planned. They quote the Court of Appeal on this point and note that there are still important checks and balances available based on the regulatory system which will ensure environmental protection, even if Part 5 of the MVRMA does not apply.

Analysis of the Arguments – Application of Part 5:

Regulatory History

The Line 21 pipeline has been screened several times in the past. In 1980, prior to construction, a comprehensive environmental review was conducted by a federal Environmental Assessment and Review Process Panel (now the Canadian Environmental Assessment Agency).

[16] Enbridge Reply, page 4.
[17] Enbridge Reply, page 5.

A preliminary screening was done in 1995 for the Dehcho portion of Line 21, and in 1996 for the Sahtu portion of Line 21; both were conducted by Indian and Northern Affairs (DIAND). In 1998 the Exemption List Regulations came into force. When the authorizations issued by DIAND came up for renewal in 1999, it was determined that a preliminary screening was not necessary. An additional preliminary screening of the Dehcho portion was conducted by the MVLWB prior to issuing a Land Use Permit in 2002.

Case Law

The application of s.157.1 to the Enbridge Applications requires an interpretation of the law. The cases available are of considerable assistance, in particular the *Tungsten* case.

The Court of Appeal sets the groundwork for an analysis of s.157.1 as follows:

> "27. These provisions collectively reflect that Parliament did not intend to impose an entirely new environmental review process on every project in the Mackenzie Valley irrespective of the status of that project at the time the *MVRMA* came into effect. Instead, the *MVRMA* grandfathered certain projects and provided that others yet would be dealt with under prior applicable legislation. In interpreting s. 157.1, therefore, one must recognize that it is designed to grandfather certain undertakings which predate June 22, 1984. Accordingly, this section must be interpreted in a manner which best comports with its intended purpose.
>
> 28. It is against this general statutory backdrop that we turn to the specific wording of s. 157.1. In our view, this section is designed to generally parallel the scope of the statutory exemptions granted to projects predating June 22, 1984, under s. 74(4) of *CEAA*. *CEAA* exempts from environmental requirements any licence issuance or renewal where the "construction or operation of a physical work or the carrying out of a physical activity was initiated before June 22, 1984." By contrast, s. 157.1 of the *MVRMA* ties the exemption to a licence related to an undertaking that is "the subject of a licence or permit issued before June 22, 1984."
>
> 29. However, this difference in wording does not reflect a Parliamentary intention to expand the reach of the *MVRMA* by narrowing the category of projects predating June 22, 1984 that are exempt from full scale environmental assessments. The approach taken under the *MVRMA* is complementary to that taken under *CEAA* and intended to be so. Both Acts exempt projects which predate the same date, namely, June 22, 1984. That is the date on which the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467, the predecessor to *CEAA*, came into effect. The selection of this common date under both *CEAA* and the *MVRMA* reflects Parliament's continuing intention that projects which predate June 22, 1984, (as defined under both statutes) are to be subjected to a full scale environmental assessment as prescribed under the applicable legislation only if they depart significantly from their approved mode of operation and engage in, for example, decommissioning, abandonment or significant alteration of the project."[18]

A careful reading of the LKFN and SKFN argument indicates that they are treating the word "project" as found in s.157.1 to mean the activities described in the current applications filed by Enbridge (called the "Project" herein). Whether this is the correct interpretation of s.157.1 is an important question. The specific activities set out in the applications before the MVLWB were not contemplated in the 1980 EARP review (although Enbridge says maintenance of the pipeline was). The NWT Supreme Court addressed this point:

[18] *Supra*, note 4 *Tungsten* paragraphs 27 to 29.

> 43. I note that in *Tungsten*, the Court uses the terms "undertaking" and "project" seemingly interchangeably throughout its decision. Indeed, s. 157.1 only makes sense if those words mean the same thing, since its intent must logically be that Part 5 does not apply in respect of any permit related to a qualifying undertaking except a permit for an abandonment, decommissioning or other significant alteration of the undertaking. This conclusion is consistent with the French version of s. 157.1, in which the phrase "un ouvrage ou une activité" are used where, in the English version, both "undertaking" and "project" are found.[19] (emphasis added)

This question of which "project" has to be abandoned, decommissioned or significantly altered is a key point of difference in the arguments advanced by LKFN and SKFN and Enbridge. This choice determines the backdrop or context against which the terms "abandonment, decommissioning or other significant alteration" are to be judged.

The LKFN and SKFN letters do not include any argument about "abandonment" and so that consideration can be eliminated. That leaves the LKFN and SKFN arguments about "decommissioning" and/or "significant alteration".

Enbridge notes that we are dealing with replacement of 2.5 km of an 869-km pipeline – or about 0.3% of the pipeline. They argue that the Project is a maintenance activity intended to return Line 21 to its previous use. The whole of Line 21 is not going to be decommissioned, only 0.3% of it. In addition, they argue that maintenance activities were considered in the EARP review.

Another LKFN and SKFN argument is that the 37 years since Line 21 was built have resulted in fundamental differences in the permafrost and the environment. Section 157.1, however, is about significant alteration of the "project", not the environment the project is in. In any event, review of the evidence cited by these parties does not seem to support this permafrost change argument.

LKFN and SKFN also argue that changes in the technology for replacement of the pipe under the Mackenzie River are significant. Section 157.1 does not speak about the technology used. It speaks about the "project". In addition, Enbridge points out that directional drilling will have less of an impact on the environment than the original pipeline crossing of the Mackenzie River which was based on trenching. The Board agrees with this Enbridge observation.

It can also be noted that there is nothing in the MVRMA, the cases or the language of s.157.1 which freezes the kind of maintenance activities which may be undertaken with the techniques used in the 1980s. To read that into the section could result in greater environmental effects from current maintenance activity.

Enbridge indicates there will be no significant departure from the mode of operation of Line 21. The portion of the pipeline being changed is 0.3%. The Board agrees that these are maintenance activities. Finally, LKFN and SKFN argue that Aboriginal and Treaty rights could not have been considered in 1980. There is no evidence to support this argument. Treaty 11 was in force then and certain rights flowed from it. It is not known if the issue was raised before the EARP panel or the NEB in 1980. The Board has no evidence from any party on this point.

[19] *Supra,* note 4 *Canadian Zinc* paragraph 43.

It is true to say, however, that constitutional protection of Aboriginal and Treaty rights did not exist before 1982 when the Constitution was amended giving legal force to s.35 of the *Constitution Act, 1982*. So, this argument is accurate. What is not clear is how this argument has any role in the interpretation of s.157.1 of the MVRMA.

Consideration of Aboriginal and Treaty rights is not solely dependent on the question of whether a screening or an EA takes place under Part 5 of the MVRMA or not. The Part 5 process under the MVRMA is not the only part of the environmental and regulatory process where Aboriginal and Treaty rights are considered. Where such matters are raised, they are carefully considered by the MVLWB and they would also be considered by the NEB in its proceeding if raised there.

Decision

The Board has reviewed the evidence and submissions of the Applicant, the written comments and submissions made by reviewers and the Staff Report. Having due regard to the facts and circumstances, the merits of the submissions made to it, and to the purpose, scope, and intent of the MVRMA, the Board has determined that s.157.1 of the MVRMA applies to the Applications and that the Applications are exempt from preliminary screening.

The Applications can proceed through the regulatory process.

A summary of the Board's reasons for this decision is set out below.

- The project was subject to an Environmental Assessment, conducted by a federal Environmental Assessment and Review Process Panel prior to June 22, 1984, and to several preliminary screenings.
- Based on review of the French version of s.157.1 of the MVRMA and paragraph 43 of the NWT Supreme Court *Canadian Zinc* decision, the words "undertaking" and "project" in s.157.1 refer to the same project and that, in this case, is Line 21 in its entirety. The whole of Line 21 is not going to be decommissioned.
- Concerns raised regarding the fundamental differences in the permafrost and the environment do not constitute a significant alteration of the "project".
- Concerns raised regarding the techniques used in the 1980s compared to those proposed in the Applications do not constitute a significant alteration of the "project".
- Consideration of Aboriginal and Treaty rights is not solely dependent on whether Part 5 of the MVRMA applies or not and is not the only part of the environmental and regulatory process where Aboriginal and Treaty rights are considered.

SIGNATURE

Mackenzie Valley Land and Water Board

	August 10, 2017
Mavis Cli-Michaud, Chair	Date